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OCT 3 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	

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CONSOLIDATED COMMENTS AND OPPOSITION TO SELECTED PETITIONS FOR RECONSIDERATION

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October 31, 1996

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SUMMARY

TCG has requested reconsideration of the Commission's First Report and Order on two limited issues. First, TCG requested that the Commission set certain performance standards to assure that incumbent LECs meet the interconnection requirements of new entrants. Second, TCG requested that the Commission establish two separate pricing standards to satisfy the distinct pricing standards set forth in the 1996 Act for interconnection and unbundling and for transport and termination. TCG supports the reconsideration petitions filed by the National Cable Television Association, Comcast Cellular and Vanguard Cellular on similar grounds. TCG opposes, therefore, the denial to CLECs of revenue recovery for traffic carried over their tandem switches. Thus, a CLEC should receive appropriate compensation at the tandem rate.

TCG concurs with MFS' petition requesting that cross-connections should be specifically designated as unbundled network elements and priced accordingly. In addition, the Commission should provide that it would not be inconsistent with the forward-looking incremental cost standard set by the 1996 Act for a CLEC to self-provision the cross-connect, leaving de minimis, if any, expenses for which the incumbent LEC can seek recovery.

TCG opposes the petition filed by the Public Utility Commission of Texas, which seeks to gain blanket Commission approval of its interpretations of its Public Utilities Regulatory Act ("PURA95"). This issue is before the Commission in two separate proceedings and it would be improper to consider it herein.

TCG also opposes the requests of various electric utilities that they be relieved from complying with the clear direction of the 1996 Act that they provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way. The purposes of the Act cannot be met if utilities are permitted to reserve unused space on their poles.

Finally, TCG urges this Commission to adopt the recommendation of the Wisconsin Public Service Commission ("WPSC") that interconnection agreements — including pre-Act agreements — must be made publicly available.

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Exchange Carriers and Commercial	)	
Mobile Radio Service Providers	)	

To: The Commission

CONSOLIDATED COMMENTS AND OPPOSITION TO PETITIONS FOR RECONSIDERATION

Teleport Communications Group Inc. ("TCG") hereby submits its consolidated comments in response and in opposition to certain petitions for reconsideration regarding aspects of the First Report and Order issued in the above-captioned proceeding,[1] implementing the local competition provisions of the Telecommunications Act of 1996 ("1996 Act").[2]

1. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, released August 8, 1996 ("First Report and Order").

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

I. INTRODUCTION

TCG submitted its Petition for Reconsideration in this proceeding on two limited issues. First, the Commission should set certain performance standards, as described in TCG's Petition, to assure that incumbent LECs meet the interconnection requirements of competition. The proposed performance standards and associated reporting requirements will help ensure that new entrants have an opportunity to thrive during the nascent stages of the development of competition.

Second, TCG argued that the FCC should establish two separate pricing standards to satisfy the distinct pricing standards set forth in the 1996 Act for interconnection and unbundling and for transport and termination. A number of commenters, including the National Cable Television Association ("NCTA"), and Comcast Cellular and Vanguard Cellular have submitted Petitions for Reconsideration on this ground. TCG supports these petitions and urges the Commission to act on its petition as requested. TCG opposes, therefore, any attempt to deny CLEC revenue recovery for traffic carried over its tandem switch. Thus, the CLEC should receive appropriate compensation at the tandem rate. TCG also concurs with MFS' petition requesting that cross-connections should be specifically designated as unbundled network elements and priced accordingly.

TCG opposes the petition filed by the Public Utility Commission of Texas, which seeks to gain blanket FCC approval for clearly anticompetitive interpretations and aspects its Public Utilities Regulatory Act ("PURA"). This issue is already being addressed by the Commission in two separate proceedings and is improperly raised in this context.

TCG also opposes the attempts by various electric utilities from complying with the clear mandate of the 1996 Act that they provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way. The requirement of this provision cannot be met if utilities are permitted to reserve unused space on their poles.

Finally, TCG urges this Commission to adopt the recommendation of the Wisconsin Public Service Commission ("WPSC"). The WPSC recognizes that full disclosure of interconnection agreements — including pre-Act agreements — must be made publicly available.

II. THE COMMISSION SHOULD ESTABLISH A DISTINCT PRICING STANDARD FOR TRANSPORT AND TERMINATION AND ENSURE THAT IT IS APPLIED TO THE CLEC TANDEM

A. The 1996 Act Requires That The Commission Establish a Separate, Distinct Pricing Standard for Transport and Termination

In the First Report and Order, the Commission applies the same costing methodology for interconnection and unbundled network elements (TELRIC) to determine the appropriate pricing for the transport and termination of competitors' traffic. However, this standard does not account for the fact that the 1996 Act sets forth a separate, distinct pricing standard for this function. The TELRIC methodology is deficient as applied to transport and termination because it bears no relationship to "a reasonable approximation of additional costs of terminating such calls."[3] The Commission's adoption of a single pricing methodology to satisfy both sections 252(d)(1) and 252(d)(2) of the 1996 Act is contrary to the clear intent of Congress as expressed in the 1996 Act.

NCTA raises a similar point in its Petition for Reconsideration, stating that "Congress clearly established two distinct standards for the pricing of unbundled network elements and transport and termination. The Order errs by applying to the pricing of transport and termination the same standard that it developed for the pricing of unbundled network elements."[4] Like TCG, NCTA looks to the plain language of the 1996 Act to support this position. Recovery for transport and termination costs are to be based on "a reasonable approximation of the additional costs of terminating such calls."[5] Simply stated, "additional costs," a term which embodies the concept of incremental costs, does not include any joint and common costs.[6]

B. Bill And Keep Is An Appropriate Interim Compensation Measure

In any event, the Commission correctly has permitted states to adopt bill and keep as an interim measure. Because bill and keep is "an efficient means of compensation," the Commission should specifically provide that states may adopt bill and keep for a one-year period after permanent number portability has been

3. See TCG at 8 (citing 47 U.S.C. § 252(d)(2)(ii)).

4. NCTA at 7 (footnote omitted).

5. 47 U.S.C. sec. 252(d)(2)(A)(ii) (emphasis added); see also TCG at 12; NCTA at 8.

6. NTCA at 9.

deployed, regardless of the balance of traffic. TCG agrees with NCTA's assertion that the measurement of CLEC traffic will be premature until a CLEC has had a reasonable opportunity under fair competitive conditions to establish a traffic exchange with the incumbent LEC.[7] Moreover, a traffic exchange under such conditions is impossible in the absence of permanent number portability, given the "cost and technology handicaps associated with ILEC interim number portability measures."[8] NCTA's proposal, therefore, would indeed "provide a powerful incentive for ILECs to move quickly to implement the Commission's number portability requirements."[9]

C. CLECs Should Be Properly Compensated For Switched Access Service Provided At The CLEC Tandem

Contrary to the Petitions for Reconsideration submitted by the Local Exchange Carrier Coalition ("LECC") and Sprint, the Commission should ensure that CLECs are appropriately compensated for providing tandem switching. As stated by MFS, "[t]he concept of symmetric compensation for transport and termination of traffic is central to the Commission's model establishing the relationship between incumbent carriers and new entrants on the local exchange markets."[10] Cox Communications, Inc. raises the related point that without symmetry in rates "when networks with differing architectures are interconnected, a regulatory bias

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7. Id. at 6.

8. Id. at 7 (footnote omitted).

9. Id. at 6.

10. MFS at 25.

in favor of incumbent LEC architectures and technologies and against the technologies and architectures deployed by . . . CLECs may well emerge."[11]

TCG's network provides a useful example to illustrate these points. TCG's switch operates as a tandem, can transport traffic in an area comparable to that served by the incumbent LEC's tandem switch, and in some cases combines the tandem and end office functions.[12] When TCG provides these services, it should receive the same rate as the incumbent LEC for providing the same service.[13] Cox correctly observes that "the architectures of incumbent LEC networks and the networks of new entrants often differ significantly. . . . Incumbent LEC network architectures often reflect accommodations to technology in use thirty to fifty years ago."[14] A distinction should not be made between the CLEC tandem that

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11. Cox at 7. Comcast Cellular and Vanguard Cellular raise the same point with respect to CMRS networks. Comcast and Vanguard at 14 ("The FCC must require that the principles of symmetrical compensation and nondiscrimination apply whether a CMRS provider interconnects with an incumbent LEC at an end office, a tandem switch or some hybrid thereof. The rule . . . fails to account for the variety of switching configurations that CMRS and new entrants may employ.").

12. See also MFS at 26 ("MFS is installing switches that provide tandem switching functionality.").

13. Indeed, the appropriate compensation will help provide the economic incentive for CLECs to invest in and deploy the additional infrastructure that will enable them to provide facilities-based competition in the local exchange market. See Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II, CC Docket No. 91-141, 9 FCC Rcd 2718, 2718 (1994) ("The steps we now take will enable interconnectors, as well as other parties, to provide tandem switching functions . . . . [T]hese measures will open the door to third parties to provide competitive tandem-switching services.").

14. Cox at 4.

provides both the tandem and end office function and the incumbent LEC's separate tandem and end office, just because the incumbent LEC may have to employ both facilities to complete a call, while the CLEC employs more efficient technologies. In fact, TCG has already negotiated arrangements for the provision of jointly provided switched access services with BellSouth, NYNEX, and Pacific Bell, thereby demonstrating the reasonableness of this position.

The tandem rate applied to CLECs should not be based on the number of switches used, as argued by the LECC and Sprint.[15] Instead, the rate should generate for the CLEC the same revenues collected by an incumbent LEC providing the equivalent service. Section 251(c)(2) of the Telecommunications Act of 1996 requires that incumbent LECs negotiate "for the transmission and routing of telephone exchange service and exchange access . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The competitive tandem service which TCG wishes to offer requires the incumbent LEC to "transmit and route exchange access," and the Commission should ensure that the rates, terms and conditions of such services will be fair and appropriate. It can take a step in the right direction by holding that CLECs should receive 100 percent of the RIC when providing the tandem switching service.

The access charges imposed by the incumbent LEC on interexchange carriers currently include the RIC, and this charge is collected whenever a call is routed through the end office. However, the charge includes costs which are

15. LECC at 14; Sprint at 13.

incurred at the level of the incumbent LEC's tandem switch and transport facilities. The Commission has required that the RIC include 80 percent of local tandem costs, so only 20 percent of those costs are being recovered in the tandem switching charge.[16] The effect of this practice is to set an effective ceiling on the rates that TCG can charge for the same service. In this light, allowing an incumbent LEC to charge the RIC in every instance, even where TCG provides all the tandem and transport services, would enable the incumbent to collect the remaining 80 percent of its tandem switching costs, resulting in its being subsidized by TCG and its customers. At the same time, TCG would be denied an opportunity to earn a reasonable return on its access tandem service because it would have to compete against a rate set by the incumbent LEC that recovers only 20 percent of its cost. Such an outcome is anticompetitive. Therefore, the CLEC should receive the transport rate — including 100 percent of the RIC — in either case where its switch serves a geographic area comparable to that of an ILEC tandem or its network provides the tandem service.[17]

III. THE CROSS-CONNECT FACILITY SHOULD BE CLASSIFIED AS AN UNBUNDLED NETWORK ELEMENT

TCG agrees with MFS' reconsideration request that the Commission specify that a cross-connect facility is an unbundled network element and should be priced

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16. See id. at ¶ 723 (footnote omitted); see also Competitive Telecommunications Association v. FCC, 87 F.3d 522, 530 (D.C. Cir. 1996).

17. MFS at 27.

according to the applicable standard. The cross-connect is a required element for interconnection, and CLECs are entitled to obtain this element pursuant to the price standard set forth in section 252(d)(1) of the Act.[18]

It would not be inconsistent with this forward-looking incremental cost standard for the CLEC to self-provision the cross-connect. As MFS notes, some RBOCs seem inclined to use nonrecurring charges for cross-connect to recover revenues lost elsewhere.[19] The best method for countering such blatant cross-subsidy is to permit CLECs to self-provision the equipment for cross-connect. Under this policy, the CLEC would purchase the equipment necessary to effectuate cross-connection and provide that equipment to the incumbent LEC for its installation and maintenance.

The FCC's Rules entitle a CLEC to utilize its own subcontractors to construct the physical collocation space. Section 51.323(j) provides:

> An incumbent LEC shall permit a collocating telecommunications carrier to subcontract the construction of physical collocation arrangements with contractors approved by the incumbent LEC, provided, however, that the incumbent LEC shall not unreasonably withhold approval of contractors.[20]

Consistent with this rule, CLECs should also be able to provision the equipment to effectuate cross-connections and to construct its own cross-connection facilities

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18. See id. at 8.

19. Id. at 9 (reporting that RBOCs needlessly have required payment for custom engineering and access to maintenance operating systems, thereby driving up the cross-connect non-recurring charge).

20. 47 C.F.R. § 51.323(j).

which would displace the facilities of the incumbent LEC. This resolution would enable the Commission to avoid further disputes over cross-connection fees.

In addition, it should be noted that section 252(c)(6) of the 1996 Act requires incumbent LECs to provide for the "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier" at rates that are just, reasonable, and nondiscriminatory. TCG's proposal on this issue will eliminate disputes over whether the incumbent LECs rates for cross-connections are discriminatory by permitting the CLEC to provide the equipment itself, leaving de minimis, if any, expenses for which the incumbent LEC can seek recovery.

IV. THE TEXAS PUC IMPROPERLY RAISES ISSUES ALREADY BEFORE THE COMMISSION IN OTHER PROCEEDINGS

The Texas PUC requests that the Commission "indicate that state provisions which merely provide additional options to carriers . . . should be viewed as consistent with the Act" and similarly, that the Commission "reconsider its ruling concerning the ability of states to impose additional obligations on non-incumbent LECs."[21] The Commission already has before it two proceedings initiated by TCG and others challenging specific provisions and interpretations of PURA95.[22] In addition, the

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21. Texas PUC at ii-iii.

22. See TCG Petition for Expedited Declaratory Ruling Regarding Preemption of Certificate Provisions in the Texas Public Utility Regulatory Act of 1995, CCB Pol 96-16; AT&T Corp. Petition for Expedited Declaratory Ruling Preempting Texas Law (consolidated proceeding), CCB Pol. 96-14.

Texas PUC itself has already sought approval of various portions of PURA95, and its petition for expedited declaratory ruling was consolidated with other petitions on similar issues.[23] These proceedings, in which comments and reply comments addressing specific provisions of the Texas Act have been submitted, are the appropriate venue for examining such issues. Petitions regarding preemption — or intended to forestall preemption — should not be resolved in the context of the FCC's implementing order.

The Texas PUC Petition for Reconsideration seeks approval of its certification scheme which functions as a barrier to competitive entry.[24] The Texas PUC states that it is "merely seeking clarification concerning the standard that the Commission will use to determine that a state provision" is inconsistent with the 1996 Act and the Commission's rules.[25] However, the Texas PUC undoubtedly intends to use such "clarification" as support for blanket approval of anticompetitive provisions and interpretations of PURA95. The Commission must reject the petition and continue to investigate specific provisions of state law as such issues arise.

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23. See supra n.22.

24. See Texas PUC at 4-7. In fact, the result of the Texas PUC's interpretation of PURA95 certification requirements would be to inhibit facilities-based competition by imposing onerous requirements upon holders of a Certificate of Operating Authority. According to the Texas PUC, carriers operating under a Service Provider Certificate of Authority are restricted to providing resold services.

25. Id. at 9 n.6.

V. THE COMMISSION SHOULD REJECT CHALLENGES BY ELECTRIC UTILITIES THAT WOULD UNDERMINE NONDISCRIMINATORY ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

A number of electric utilities have challenged the FCC's rules with respect to the reservation of pole, duct or conduit capacity for future use by telecommunications providers. For example, the American Electric Power Service Corporation charges that the FCC has exceeded its authority in finding that "[t]he electric utility must permit use of its reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space."[26] Similarly, the Consolidated Edison Company of New York claims that the Commission's rules must be reconsidered because "[u]tilities should not be mandated to allow attaching entities to use reserve space while the utility is not reserving the space."[27] Pacific Gas & Electric Company claims that the FCC's rules, requiring a plan that "reasonably and specifically" projects a need for space, imposes upon the industry a planning process inconsistent with the one currently employed.[28] Other electric companies have petitioned for reconsideration on similar grounds.[29]

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26. American Electric Power Service Corporation, et al. at 11 (quoting <u>First Report and Order</u> at ¶ 1169).

27. Consolidated Edison at 5.

28. Pacific Gas & Electric Company at 6-7; <u>see also</u> Edison Electric Institute and UTC at 8 ("It is inappropriate for the FCC to restrict utilities to reserving space only as part of a 'bona fide development plan.' Electric utilities have heretofore generally not been required to cerate, or submit for public scrutiny, 'development plans' respecting facility expansion int eh detail necessary to reflect how expansion could impact access to or use of their poles or other facilities.").

29. <u>See also</u> Carolina Power & Light Company at 14-15; Delmarva Power and Light at 5-6; Florida Power and Light Company at 10-14.

The Commission should reject claims that utilities should not be required to permit telecommunications providers to gain access to unused, yet "reserved," facility space. The 1996 Act requires a utility to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to poles, ducts, conduits, or rights-of-way owned or controlled by it."[30] Exceptions may be made only "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[31] Congress' intent is clearly to prevent utilities from blocking cable operators and telecommunications providers from utilizing available capacity on these facilities. As the Commission correctly observed, the utilities' practice of reserving space on their facilities to meet future needs "can result in a utility denying access to a telecommunications carrier or cable operator even though there is unused capacity ont eh pole or duct."[32] Indeed, "allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress."[33]

Although the utilities facially object to the Commission's implementing rules, those rules merely enforce the plain language of the statute. The utilities true objection, therefore, is with the Act itself. This Commission obviously cannot change the statutory language. However, the Commission has permitted utilities to reserve

30. 47 U.S.C. § 224(f)(1).

31. 47 U.S.C. § 224(f)(2).

32. First Report and Order at ¶ 1166.

33. Id. at ¶ 1168.

space that they can reclaim from cable operators and telecommunications providers once they have a need for the space (except to provide telecommunications or video programming service).[34] In this instance, the attaching entity will be required to pay for the cost of expanded capacity and continued attachment.[35] The Commission thus has crafted a fair approach that complies with the 1996 Act, and it should reject the utilities' petitions regarding reserving unused space, as in direct contradiction of section 224(f) of the Communications Act.

VI. ALL INTERCONNECTION AGREEMENTS SHOULD BE MADE PUBLIC

The interconnection agreement process depends upon the public availability of all agreements, including those entered before the enactment of the 1996 Act. According to the Wisconsin PSC, an incumbent LEC should be barred "from denying copies of pre-Act interconnection agreements in the same manner cost data may not be denied to a requesting carrier in negotiations."[36] TCG agrees that such agreements could provide important information that is directly relevant to ongoing efforts to enter into interconnection agreements, which in turn, are required to be made available to the public.[37] TCG also encourages the FCC to permit state

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34. Id. at ¶ 1169.

35. Id.

36. WPSC at 5.

37. See id. at 5; 47 U.S.C. § 252(h).

commissions to order that such pre-Act agreements be filed with the state commissions.

VII. CONCLUSION

For the reasons set forth herein, TCG urges the Commission to reject Petitions for Reconsideration by LECC and Sprint that would result in asymmetrical transport and termination compensation and deny CLECs the proper recovery for use of its switching facilities. Instead, the Commission should act upon TCG's Petition for Reconsideration and establish two distinct pricing standards, one for interconnection and unbundling, and the other for Transport and Termination as required under the 1996 Act. The Commission should also deny the Texas PUC's efforts to gain a blanket endorsement of anticompetitive interpretations and provisions of the Texas Public Utility Regulatory Act of 1995. In addition, various utilities have urged this Commission to reconsider its rules regarding the access to unused space on utility facilities by cable operators and telecommunications providers. These petitions are contrary to the plain language of the 1996 Act and should be rejected.

TCG also requests that the Commission approve the modest clarifications suggested in certain petitions. Cross-connects should be provided according to the standard for unbundled network elements, and CLECs should be expressly permitted to self-provision this element. Finally, any interconnection agreement, including those entered pre-Act, should be made public.

Respectfully submitted,

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October 31, 1996

CERTIFICATE OF SERVICE

I, Marjorie A. Schroeder, hereby certify that copy of the foregoing Consolidated Comments and Opposition to Selected Petitions for Reconsideration was mailed by first-class, postage prepaid mail on this 31st day of October, 1996 to the following:

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*Via Hand Delivery